SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 487

CLARENCE H. STEVENSON III, *Petitioner*

vs.

DIEBOLD, INCORPORATED, *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This case is an ordinary run-of-the-mill patent infringement action in which the District Court concluded that the patent in suit was nonobvious over the most pertinent prior art and the Court of Appeals, in reversing, concluded that the alleged invention was obvious. Nothing in the petition, respondent submits, is of sufficient stature to warrant the time of this Court in a further review of the mundane legal issues tendered for examination. In this opposition, respondent accepts the petitioner's statement of the opinions below, questions presented, consti-

tution provision and statutes involved, and statement of the case with the following additional comments.

On the procedural aspects of the case, petitioner Clarence H. Stevenson III and his co-plaintiff, FMC Corporation, both appeared in the Court of Appeals shortly after respondent filed its Notice of Appeal from the final judgment below. As shown by the record in the office of the Clerk of the Court of Appeals, FMC Corporation did file a brief for appellee on its own behalf on February 3, 1969. Petitioner did not file any brief on appeal and rested his support of the judgment below upon the written and oral arguments of FMC Corporation. Strangely, the original plaintiffs have now changed their active roles: Clarence H. Stevenson III now presents the sole argument in support of the final judgment of the District Court and his co-plaintiff is not even a party to the petition. When the parties thus demonstrate an unwillingness to work in double harness on this case, it would seem to be a matter which does not warrant the attention of this Court.

With regard to the facts, there are two important corrections to be made in the statement of the case. The first and most important one is one of factual error underlying petitioner's statement (Petition, page 8) that the Bruce control device was not "suitable" for use in an automatic palletizer of the type claimed in the Stevenson patent. In this regard, for the purpose of simplifying the proofs at the trial, all parties stipulated that the pallet loader described in the Bruce patent, the pallet loaders manufactured and sold by Production Aids Incorporated, the pallet loader described in the Stevenson pat-

ent, and the accused Lamson pallet loaders "all have the following features in common" followed by a recitation of seven numbered elements (Plaintiff's Exhibit 3, paragraph 1). Items (3), (4), (5) and (7) are the precise features to which the petitioner directs his complaint as to absence of evidence. Plaintiff's Exhibit 6, page 107, sets forth the basis for the stipulation as follows:

> "Mr. Lyon: So far as the programming and control means are concerned, I think we will be willing to stipulate that the Bruce patent showing and the Stevenson showing and the construction and operation of the Lamson machine and the Production Aids Incorporated machine are the same for the purposes of this suit.
>
> "Mr. Simonton: With that understanding, I shall be prepared to concede infringement of a number of these claims. I would like an opportunity to go over them in more detail and advise you formally later."

Of course, there was no "evidence" in addition to the stipulation. The stipulation made such evidence unnecessary.

The second correction of substance in petitioner's statement of the case is one of omission rather than commission. The Court of Appeals found that the Stevenson combination was an obvious combination of the best features in the Bruce prior art machine and the machine disclosed in a prior art Montgomery patent (Appendix, pp. 8, 9, 10, 12 and 13). Petitioner does not so much as once mention the Montgomery patent in the entire 16 pages of his petition. In failing to direct attention to the reasoning upon which the Court of Appeals bases its decision, petitioner presents nothing tangible for review by this Court.

Turning now to the reasons advanced for the allowance of the writ, petitioner's first point is that the question of obviousness under 35 U.S.C. 103 should be determined as a question of fact and not as a question of law (Petition, pp. 2, 9-15). In the first place, respondent submits that such error cannot be asserted on the record which petitioner tenders to this Court. In the Brief for Appellee FMC Corporation, filed February 3, 1969, to which reference has been made (this opposition, page 2), the Court of Appeals was told (page 4),

> "As we have noted, Lamson has limited itself in this appeal to inquiry into the unobviousness of the Stevenson invention in the light of two prior art patents. Disposition of this appeal is therefore predicated upon the statutory strictures of Section 103 of Title 35, U.S.C. While the question of validity under that section is ultimately one of law, that legal conclusion has always been based on certain factual determinations. . . ."

It should be too late now to change the ground rules to support a plea for a further review of the case.

In the second place, respondent submits that the question is no longer an open one. This Court has held the question of invention and the related question of obviousness to be questions of law, notwithstanding concurrent findings of both the District Court and the Court of Appeals:—in holding invalid Turnham's combination patent for a grocery store cashier's counter in *A. & P. Tea Co. v. Supermarket Corp.* (1950), 340 U.S. 147; Trager's combination patent for a child's amusement device in *Crest Specialty v. Trager* (1951), 341 U.S. 912; and Scoggin's combination patent upon a finger sprayer in

Graham v. John Deere Co. (1966), 383 U.S. 1, at pages 26-37. Petitioner presents no convincing reasons warranting a reconsideration and revocation of the consistent rule of these three cases.

Petitioner's second point, based on the alleged merits of his own patent (pp. 14-16), should be rejected on two grounds. The first and foremost is that analogous factual determinations were urged in support of the findings of invention and nonobviousness in each of the three cases cited above and they were deemed insufficient to overcome a clear showing of lack of invention or obviousness. The second is that it is not the function of the certiorari procedure to grant a second level of review in ordinary patent cases, a matter set at rest in *Layne &c. Co. v. Western Well Works* (1923), 261 U.S. 387.

For the foregoing reasons, respondent submits that the petition should be denied.

Dated, San Francisco, California,
August 28, 1970.

Respectfully submitted.

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